

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JUDGE DAVID M. GLOVER

DIVISION I

CACR06-198

January 24, 2007

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[CR-2003-1714, CR-2005-805]

ADRIAN CARL RYAN

APPELLANT

V.

HONORABLE DAVID L. REYNOLDS,  
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED; MOTION TO BE  
RELIEVED GRANTED

On February 6, 2004, Adrian Ryan pleaded guilty to domestic battering in the third degree in case number CR-2003-1714 in Faulkner County Circuit Court. He was sentenced to two years in the Arkansas Department of Correction, with an additional three-year suspended imposition of sentence. On August 26, 2005, Ryan was found guilty of domestic battering in the first degree in a bench trial in case number CR-2005-0805. He was sentenced as a habitual offender to ten years in the Arkansas Department of Correction, with an additional two years added as an enhancement under Arkansas Code Annotated section 5-4-702 (Repl. 2006). Furthermore, as a result of his conviction for first-degree domestic battering, Ryan's suspended imposition of sentence in CR 2003-

1714 was revoked, and he was sentenced to three additional years in prison for that third-degree domestic battering conviction. All of Ryan's sentences were ordered to be served consecutively.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court of Appeals, Ryan's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. Counsel's motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to Ryan made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished Ryan with a copy of his counsel's brief and notified him of his right to file *pro se* points. Ryan has filed *pro se* points.

At trial, Kathy Clements testified that she and Ryan had lived together and that they had a four-year-old son, Cory Clements. Clements said that on July 10, 2005, Ryan spent the night with her and Cory; that she and Cory had gone to bed; that Cory had awakened and had gotten out of bed; that Ryan had "punched" Cory in the back; that when Ryan started to hit Cory again, she blocked him and her fingernail hit Ryan in the eye; that Ryan got mad and punched her in the left eye twice; that she ran into the bathroom; that Ryan told her to come back and lie down; and that she did what Ryan told her to do so that there would be no more trouble. Clements stated that when she began to get back into the bed,

Ryan nudged her and her arm got caught in his shirt, ripping it. Ryan told Clements that she would not do that again, and he punched her in the left eye again and then in her nose. Clements said that she felt bones breaking; that everything went black; and that Ryan kept hitting her three or four more times. When Clements came to, she said that Cory was screaming that she was bleeding; that there was blood covering the bathroom floor; and that she could not get the bleeding to stop for at least forty-five minutes. She testified that Ryan helped her get the bleeding stopped, and that he went to Kroger to get her some ice for the swelling. Clements said that she passed out, and that when she came to, Ryan had taken her shirt off and was soaking it in the sink to get the blood out, that he was washing the blood off her, and that he had cleaned up the blood in the bathroom.

Clements took Ryan to Carla Hightower's house and went to Tara Hamilton's house. She then went to the police station and from the police station to the hospital, where she had x-rays taken. Clements testified that as a result of Ryan's violence, she had an orbital contusion, permanent bruising on her eyelids, a broken nose, and "some kind of brain closure thing." Clements also said that Ryan made Cory sit and watch him hit her.

Officer Chad Wilson testified that Clements came to the police station on July 10, 2005, and that she was disoriented and confused. He said that she had scrapes under her chin, that both of her eyes were blackened, and that her nose would bleed occasionally. Wilson took pictures of Clements's injuries, although he said that the pictures did not turn

out as well as he thought they should and that the swelling on Clements's nose was difficult to see in the pictures.

The State rested, and the defense called Lyria Greenlaw, Ryan's cousin, who testified that she was living at Carla Hightower's residence on July 10, 2005, and that Ryan had been at Hightower's residence when she woke up between eight and nine that morning and that he was there until the police came to the house and arrested him. Carla Hightower testified that she and Ryan were dating, that Ryan had been at her house continuously from nine thirty or ten on the night of July 9 until 4:00 or 4:30 on the afternoon of July 10, and that he slept in their bed that night.

Ryan testified in his own defense, denying that he was anywhere near Clements's house during the early morning hours of July 10, 2005. He said that Clements was making those allegations because they were no longer together and that she was jealous and did not like his girlfriend. The defense rested after Ryan's testimony.

The State called Tara Hamilton as a rebuttal witness. Hamilton testified that she called Clements from her job at around 10:30 p.m. on the night of July 9, 2005, and that Ryan answered the phone. She said that she asked to speak to Clements, but that Ryan told her Clements was asleep. Defense counsel objected on the basis of hearsay, but the trial court overruled this objection on the basis that it was a statement of a party opponent. Hamilton said that she talked to Clements that night after 12:30 a.m.; that she could hear arguing over the phone; that she could tell something was wrong; and that she was

absolutely sure that she heard Ryan in the background. The State rested its rebuttal case after Hamilton's testimony.

After the State's rebuttal testimony, the trial court found Ryan guilty of first-degree domestic battering. Ryan was sentenced as an habitual offender to ten years in prison, and that sentence was enhanced an additional two years pursuant to Arkansas Code Annotated section 5-4-702, to run consecutively to the ten-year sentence. Additionally, the trial court revoked Ryan's suspended imposition of sentence in CR-2003-1714 and sentenced him to three years in prison, to be served consecutively to his other sentences.

The issue of the sufficiency of the evidence to support Ryan's conviction for first-degree domestic battering is not preserved for appellate review. Rule 33.1(b) of the Arkansas Rules of Criminal Procedure provides, in pertinent part, "In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence." Failure to challenge the sufficiency of the evidence at the time and in the manner required by Rule 33.1(b) constitutes a waiver of any sufficiency-of-the-evidence question on appeal. Ark. R. Crim. P. 33.1(c). In the present case, Ryan made no motion for dismissal at the close of all of the evidence; therefore, pursuant to Rule 33.1, this issue is not preserved for appellate review.

During the course of the trial, there was only one ruling made by the trial court that was adverse to Ryan. During Tara Hamilton's rebuttal testimony, she testified about a telephone conversation she had with Ryan in which Ryan told her that Clements was

asleep. Ryan's counsel objected on the basis of hearsay, but the trial court overruled that objection on the basis that it was an admission of a party opponent. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c). However, this statement was not hearsay because it was not being offered to prove the truth of the matter asserted, *i.e.*, that Clements was asleep. Rather, it was offered to show that Ryan answered the telephone at Clements's house on the night of July 9, after Ryan had denied being at Clements's house on the night of July 9 and the early morning hours of July 10. The State put Tara Hamilton on the witness stand as a rebuttal witness to testify that she talked to Ryan on the telephone at Clements's house around 10:30 on the night of July 9. Hamilton's testimony tended to disprove Ryan's testimony that he was not at Clements's house on the night of July 9. The trial court was correct in overruling the objection, although for a different reason than stated.

The trial court sentenced Ryan to ten years in prison. First-degree domestic battering is a Class B felony; however, it becomes a Class A felony if the person convicted of first-degree domestic battering has been convicted of domestic battering in the third degree within five years preceding the commission of the current offense. Ark. Code Ann. § 5-26-303(b) (Repl. 2006). In the present case, Ryan had been convicted of third-degree domestic battering in 2004. However, the judgment and commitment order indicates that the trial court sentenced Ryan for the first-degree domestic battering as a Class B felony.

Nevertheless, the sentencing was appropriate. For a Class B felony, the sentence shall be not less than five years nor more than twenty years. Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006). For a Class A felony, the sentence shall be not less than six years nor more than thirty years. Ark. Code Ann. § 5-4-401(a)(2) (Repl. 2006). In either case, Ryan's ten-year sentence falls within the sentencing limitations.

The trial court enhanced Ryan's sentence pursuant to Arkansas Code Annotated section 5-4-702 (Repl. 2006). This statutory provision provides that a person who commits a felony offense involving domestic battering may be subjected to an enhanced sentence of not less than one year or more than ten years if the offense was committed in the presence of a child, and the enhancement shall be consecutive to any other sentence imposed. In this case, Kathy Clements testified that the domestic battering occurred in front of the parties' four-year-old son. Therefore, the sentence enhancement of two years, to run consecutively to Ryan's ten-year sentence for domestic battering in the first degree, was proper.

The trial court also revoked Ryan's three-year suspended imposition of sentence in CR-2003-1714 for third-degree domestic battering after Ryan was convicted of first-degree domestic battering. A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Supp. 2005). One of Ryan's

conditions of suspension was that he not violate any local, state, or federal laws. Ryan failed to comply with this condition, and the trial court properly revoked his suspended sentence after Ryan was found guilty of first-degree domestic battering.

Ryan also filed *pro se* points. Ryan first argues that his public defender did not represent him to the fullest extent. However, to the extent this can be categorized as an ineffective-assistance-of-counsel claim, it is not preserved for appellate review because no ineffective-assistance claim was made to the trial court.

Ryan also argues that the Conway Police Department did not take pictures of the crime scene or of his hands, and that he was not given a lie-detector test. He also questions why Clements did not go to the police station sooner if he had beaten her in the face. He also claims that Clements was lying about how she was injured, and that her only evidence was her friend saying that she talked to Ryan on the phone about 10:30 p.m. on the night in question. To the extent that he is challenging the sufficiency of the evidence, this argument is not preserved for appellate review for the reasons discussed above.

The last argument Ryan makes is that there was racial bias because Ryan is an African-American man and Clements is a Caucasian female. However, this argument was not made to the trial court, and is therefore not preserved for appellate review.

From a review of the record and the brief presented to this court, Ryan's counsel has complied with the requirements of Rule 4-3(j) of the Arkansas Rules of the Supreme Court and the Court of Appeals. Counsel's motion to be relieved is granted and Ryan's



conviction for first-degree domestic battering and the revocation of his suspended imposition of sentence for third-degree domestic battering is affirmed.

Affirmed.

BIRD and VAUGHT, JJ., agree.